IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 98-CF-1045

Marquette E. Riley,
Appellant,

VS.

United States,
Appellee.

On Appeal from the
Superior Court of the District of Columbia
F 2594-97

REPLY TO GOVERNMENT OPPOSITION TO REHEARING

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DISTRICT OF COLUMBIA COURT OF APPEALS

MARQUETTE E. RILEY, **APPELLANT,** VS. **UNITED STATES,** **APPELLEE.**	No. 98-CF-1045 (F 2594-97)

ARGUMENT

Appellant Marquette E. Riley files this Reply because, in its opposition to his Petition for Rehearing and Suggestion of Rehearing *en Banc*, the government makes arguments it has not previously made in this case, and it misstates the procedural history in significant respects.

It makes the novel argument that "Generally, and in this case, the existence of a Sixth Amendment right to counsel at post-arrest custodial interrogation is an academic question without real consequences. If the right exists, it is waived in precisely the same manner as the undoubted Fifth Amendment right to counsel in the same circumstances." Gov't Opp., 3. (citing *Patterson v. Illinois*, 487 U.S. 287, 298 – 300, 108 S. Ct. 2389, 101 L. Ed. 2^{d} 261 (1988). "If ... the unanimous Division correctly rejected the Fifth Amendment argument, it necessarily would have rejected, upon precisely the same grounds, a parallel Sixth Amendment argument." Gov't Opp., 2.

The holding of *Patterson* would be applicable if the government made these arguments in regard to Mr. Riley's codefendants, Antonio Marks and Sayid Muhammad, because each of them waived his right to silence and to the assistance of counsel the first time police advised him of his rights. *Texas v. Cobb*, 532 U.S. 162, 175, 121 S. Ct. 1335, 149 L. Ed. 2^{d} 321 (2001)(Kennedy, J. concurring)("Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny — not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone"). But Mr. Riley did not waive his right to counsel when

Metropolitan Police detectives Oliver Garvey and Donald Sauls advised him of his rights shortly after 9 a.m. on September 9, 1996.

The Supreme Court rejected the government's analysis in *Fellers v. United States*, 540 U.S. 519, 523 – 4, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004):

> We have held that an accused is denied "the basic protections" of the Sixth Amendment "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201, 206, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); cf. *Patterson v. Illinois, supra* (holding that the Sixth Amendment does not bar postindictment questioning in the absence of counsel if a defendant waives the right to counsel).
>
> We have consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases, see *United States v. Henry*, 447 U.S. 264, 270, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980)("The question here is whether under the facts of this case a Government agent 'deliberately elicited' incriminating statements . . . within the meaning of *Massiah*"); *Brewer*[*v. Williams*, 430 U.S. 397,] 399, 97 S. Ct. 1232, 51 L. Ed. 2d 424 [(1977)](finding a Sixth Amendment violation where a detective "deliberately and designedly set out to elicit information from [the suspect]"), and we have expressly distinguished this standard from the Fifth Amendment custodial-interrogation standard, see *Michigan v. Jackson*, 475 U.S. 625, 632, n. 5, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986)("[T]he Sixth Amendment provides a right to counsel . . . even when there is no interrogation and no Fifth Amendment applicability"); *Rhode Island v. Innis*, 446 U.S. 291, 300, n. 4, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable")....

THE SIXTH AMENDMENT RIGHT TO COUNSEL FUNCTIONS DIFFERENTLY THAN THE FIFTH AMENDMENT RIGHT

The Supreme Court has repeatedly distinguished the right to counsel it found under the Fifth Amendment in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), from the Sixth Amendment right to counsel.

Express Waiver v. Unambiguous Assertion

The counsel guarantee of the Fifth Amendment must be invoked by the accused, and where the record is silent, the invocation is ambiguous, or the person vacillates and eventually makes an inculpatory statement, courts often conclude that the statement is admissible. *See, e.g. McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991)(invocation of

the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney"). When a defendant moves to suppress a statement obtained in violation of his Fifth Amendment right, the judge must first determine whether he asserted the right to counsel and "may admit his responses to further questioning [] on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984)(citing *Edwards v. Arizona*, 451 U.S. 477, 484 – 5, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)).

Once the Sixth Amendment right to counsel attaches, the accused need not say anything; and a reviewing court must assume from a silent record that the defendant invoked his right to counsel. Any ambiguity must be resolved in favor of preserving the right and against a government claim of waiver. *Johnson v. Zerbst,* 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). In Mr. Riley's case, therefore, even if this Court finds that his initial negative answer to the question on the Prince George's County rights waiver form — "do you want to make a statement at this time without a lawyer?" — was ambiguous, it must conclude that he invoked the right to counsel.

Distinctions Between the Rights

The distinction drawn by the Supreme Court between the Fifth Amendment right to counsel and the Sixth Amendment right to counsel has several bases.

The most obvious is that the stated purpose of the Fifth Amendment privilege is protection of the defendant against compulsory self-incrimination. In *Miranda, supra*, at 478 – 9, the Supreme Court held that

> when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he ... has the right to the presence of an attorney, and that if he cannot afford an attorney

one will be appointed for him prior to any questioning if he so desires.

See, also, Innis, supra, 446 U.S. at 297(in *Miranda* "the Court concluded that in the context of 'custodial interrogation' certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination").

A central focus of the Sixth Amendment is the guarantee of competent legal assistance when the defendant, an untrained layman, must confront the organized forces of government in an arena governed by complex procedural and substantive rules. *United States v. Ash*, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973).

> [G]iven the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings is far from a mere formalism....

Michigan v. Jackson, supra, 475 U.S. at 631 (citations and internal quotations omitted).

Another reason for the distinction is that when a suspect is formally charged with a crime, the government's role shifts from that of an investigator seeking to solve a crime to that of a prosecutor bent on obtaining a conviction. The Sixth Amendment right attaches at the point when the accused is "confronted, just as at trial, by the procedural system or by his expert adversary, or by both." *Ash, supra.* at 310. In Mr. Riley's case, as DeLoach admitted in the suppression hearing, the

> police were not ... merely trying to solve a crime, or even to absolve a suspect. ... They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny.

Spano v. New York, 360 U.S. 315, 323, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959)(citations omitted). Concurring in *Spano,* Justice Douglas wrote,

> [t]his is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police. This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel.

Id. at 326. The Supreme Court explained that after charges have been filed in cases like Mr.

Riley's, confrontations between the accused and police are "critical stage[s]" in the prosecution, citing its statement in *Massiah, supra*, that in such situations "counsel could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution." *Ash, supra*, at 312.

Mr. Riley had the right to counsel under the Sixth Amendment even though he had not yet been indicted or arraigned on the murder charge.

> In *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, we drew upon the rationale of *Hamilton*[1] and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer.

United States. v. Wade, 388 U.S. 218, 225, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

These distinctions clearly are not "academic," and the holding of the Panel that Mr. Riley waived his Fifth Amendment right to counsel, even if correct, clearly does not inevitably support the conclusion that rejection of his Sixth Amendment claim was correct as well.

MR. RILEY ASSERTED AND NEVER WAIVED HIS FIFTH AMENDMENT RIGHT TO COUNSEL

The government argues that Mr. Riley's response on the first rights waiver form and under Garvey's questioning that he did not want to answer questions without a lawyer present was an assertion of his right to remain silent, but not his right to counsel. Gov't Opp., 8 – 10. As did the Panel, the government relies on *United States v. Davis*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), to reach the conclusion that a "No" answer to the purportedly ambiguous question on the Prince George's Police rights waiver "failed to invoke his right to counsel ... and, indeed, constituted a valid waiver of rights." Gov't Opp., 9. The Maryland Court of Special Appeals, in *Wantland v. State*, 435 A.2d 102 (Md. 1981), said the question is an assertion of the right to counsel, but the government dismisses that opinion as "pre-Davis" and, therefore, superseded.

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[1] *Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961).

The error in that argument is that it ignores the unequivocal reiteration in *Davis, supra*, at 458, that "[t]he right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it 'requir[es] the special protection of the knowing and intelligent waiver standard.... If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him." (citations omitted). *Davis* holds that police, having obtained a valid waiver, may continue interrogation until the defendant unambiguously requests counsel. *Id.* at 459. It does not hold that unless a defendant in custody specifically requests counsel at the outset his interrogators can, as did P.G. Police Det. Dwight DeLoach in this case, repeatedly engage in tactics designed to elicit confessions. It does not hold that the suspect's silence constitutes waiver of the right to counsel. *Johnson v. Zerbst, supra.*

The havoc the Panel's interpretation would cause is illustrated by the government's assertion that if a suspect answers "No" to the question on the Metropolitan Police PD-47 form, "Do you wish to answer any questions," investigators do not have to ask whether the person wants to speak with a lawyer. Gov't Opp., 9 – 10. *See, also, Billups v. State*, 762 A.2^{d} 609, 615 (Md. 2000)(waiver embedded in multifaceted question where suspect not provided space to answer "Yes" or "No).

Because Mr. Riley never waived his Fifth Amendment right to counsel the Panel's decision is in error. *See, Crawford v. United States*, No. 01-CF-269, *Slip Op.*, 32 – 45 (D.C. Sept. 27, 2007)(Ruiz, J. dissenting).

THE GOVERNMENT CHARGED MR. RILEY BEFORE POLICE ARRESTED HIM

The government claims for the first time that "the record does not support appellant's central factual assertion that two days before he was arrested in this case, 'the government fil[ed] a formal complaint' against him." Gov't Opp, 4. It says "the prosecutor endorsed an affidavit written and executed by a police officer in support of the officer's application for an arrest warrant. The associated Complaint was executed only by the police officer, and it contains only

the officer's sworn declaration that appellant committed the offense." *Id.* at 4 – 5.

> But, as this Court stated in *Harris v. United States*, 834 A.2d 106, 121 (D.C. 2003),
>
> we assume that prosecutors will not give their approval to warrant affidavits and applications lightly.... [B]y approving the warrant application the prosecutor certainly endorses the officer's conclusion that probable cause exists to believe that the crime described in the affidavit was committed .... A prosecutor's signed approval of a warrant application would be meaningless if it did not at least signify agreement that constitutional standards for issuance of the warrant have been met and the warrant should issue.

The prosecutor's endorsement on the warrant signified the U.S. Attorney's adoption of Det. Sauls's assertion that there was probable cause to believe that Mr. Riley committed first-degree murder. The Court has held as well that "[a]n individual is 'charged' ... once a judge has signed and filed an arrest warrant in the warrant office based on probable cause derived from a complaint and supporting affidavit signed by a police officer and approved by an Assistant United States Attorney...." *In re D.H.*, 666 A.2d 462, 477 – 8 (D.C. 1995).

The government's argument that "[a] complaint ... does not bind the prosecutor and commit 'the prosecutorial forces of organized society' against" the defendant is without merit. Gov't Opp., 6. Its reliance on *Marrow v. United States*, 592 A.2d 1042, 1047 (D.C. 1991), is misplaced because the *Marrow* Court held that a juvenile does not have a constitutional right to an adversary hearing before the U.S. Attorney exercises discretion to "charge" him by filing a complaint and requesting an arrest warrant.[2]

The Complaint filed in Mr. Riley's case binds the prosecutor in the same way an identical document filed at the inception of a misdemeanor case binds the prosecutor. The U.S. Attorney

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[2] The Court acknowledged that "the constitutional right to counsel at all critical stages of a prosecution reflects different policy goals from those involved in triggering the automatic transfer of jurisdiction ... and thus does not inform our decision here." *Marrow, supra*, 1046 n. 9. The Court did not, as the government claims, decide that the Sixth Amendment right to counsel does not attach when a person is "charged" by Complaint and an arrest warrant is issued. In fact, it could not do so because juveniles alleged to be delinquent have a right to counsel under D.C. Code § 16-2304 and the Due Process Clause of the Fifth Amendment, but not the Sixth Amendment. *In re A.L.M.*, 631 A.2d 894, 898 (D.C. 1993).

may move at any time to dismiss a charged lodged by complaint or indictment, but until that occurs "the prosecutorial forces of organized society" are aligned against the defendant. It should be noted that the government had to obtain Court approval eight months after it indicted Mr. Riley to *nolle prosequi* the charge lodged in the Complaint. See Addendum A.

Noting that the Complaint identified Larell Littles, but not his brother Larnell or their friend Robert Johnson, as the only victim, the government argues for the first time that "[b]ecause the Sixth Amendment is offense specific, ... if Sixth Amendment rights attached with the filing of a complaint, they would be limited to that offense and would not encompass any other offense, e.g., the murder of Larell's brother or the assault on his friend." *Id.* at 5 n. 5. In making that argument the government ignores this Court's holding that "the Sixth Amendment right to an attorney and the exclusionary rule for its violation by governmental authorities is specific to the offenses related to the charged offense." *A.L.M., supra*, at 899 (citing *People v. Buckles*, 399 N.W.2^{d} 421, 424 (Mich. App. 1986)("the Sixth Amendment right to an attorney is specific to the criminal episode in which an accused is charged"). *See, also, Sweet v. United States*, 756 A.2^{d} 366, 378 (D.C. 2000)("the police can initiate discussion with the defendant about crimes unrelated to the one for which he is in custody").

Noting that several states and federal courts previously had interpreted *McNeil, supra*, as applying to crimes charged and related offenses, the Supreme Court said "we could just as easily describe the Sixth Amendment as 'prosecution specific,' insofar as it prevents discussion of charged offenses as well as offenses that, under *Blockburger*,[3] could not be the subject of a later prosecution." *Cobb, supra*, 532 U.S. at 173 n. 3. The government could not have prosecuted Mr. Riley first for killing Larell Littles and subsequently for killing Larnell and assaulting Johnson. Therefore, Mr. Riley invoked his right to counsel as to all charges in the indictment.

The government claims that even if the P.G. County rights waiver form is ambiguous, the ambiguity should not be resolved against the government because "Prince George's County [] is

[3] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

not a party to this case." Gov't Opp. 9. It cannot deny, however, that detectives Garvey and Sauls gave Mr. Riley the *Miranda* warnings. Their decision to use the P.G. waiver form, rather than a PD-47, does not absolve the government of responsibility for failure to obtain a valid waiver of the right to counsel.

Finally, the government argues that adverse judicial proceedings did not begin until the grand jury indicted Mr. Riley in March 1997, and claims that because the arrest warrant was never executed prosecution could not have begun September 7, 1996, when the complaint was filed. Gov't Opp., 7 n. 6. This is an error because DeLoach testified that Mr. Riley was arrested on the D.C. warrant. Tr. 4/21/98, 203, 205. If the warrant had not been executed there would have been no need to *nolle* the charge in November 1997. The lapse between arrest and arraignment on the indictment occurred because Mr. Riley was charged in Prince George's County in an unrelated homicide case and he was not extradited to D.C. until after he pleaded guilty and was sentenced in that case.

CONCLUSION

For the reasons stated in the Petition for Rehearing and Suggestion of Rehearing *en Banc*, above, and any others that appear to the Court Appellant Marquette E. Riley respectfully requests that the Court grant the petition, vacate his conviction and remand the case for a new trial with instructions that all oral and written statements police obtained from him in this case must be suppressed.

Respectfully submitted,

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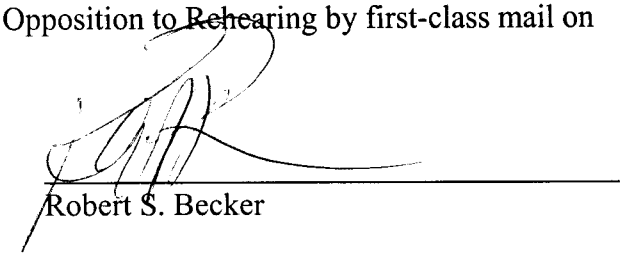
CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Marquette E. Riley, certify that on November 17, 2003 I served a true copy of the attached Reply to Government Opposition to Rehearing by first-class mail on counsel listed below.



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ADDENDUM A

L 65

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

No. USW 1227-96

COMPLAINT

DISTRICT OF COLUMBIA ss:

The undersigned, having made oath before me, declared that on or about the XXXX 20th day of AUGUST, 19 96, at the District aforesaid, one

MARQUETT E. RILEY OF 2308 GAYLORD ROAD, SUITLAND MARYLAND

While armed with a dangerous or deadly weapon did then and there unlawfully and feloniously, with purpose, with premeditation and with malice aforethought, kill and murder one, XXXXXXXXXXXXXXXXXX ARELL LITTLES

in violation of Title 22 Section 2401/3202 of the District of Columbia Code.

Don S. Sauls
Affiant's Name:

Subscribed and sworn to before me this 7th day of SEPTEMBER, 19 96

Michael Rankin
(Judge) (XXXXXXXX)

WARRANT

To The United States Marshal or any other authorized federal officer or the Chief of Police of the District of Columbia:

WHEREAS the foregoing complaint and aff[...] g the allegations thereof have been submitted, and there appearing probable c[...]'s for the issuance of an arrest warrant for MARQUETT E. RILEY

YOU ARE THEREFORE COMM[...] NDANT BEFORE SAID COURT OR OTHER PERSON ENUMERATE[...] answer said charge.

F 2594-97

Issued SEPTEMBER 7

SEX: male
DOB: 8/24/78
CCR: 472-117
ID:

Charge: Murder I (U-965) While armed

Date of Offense: on or about 8/20/96
Officer Det. D. Sauls
Badge No.:

[signature]
Judge
Superior Court of the District of Columbia

OFFICER MUST EXECUTE RETURN:
Officer's Name
Time
Date

Form CD 1614 (May 68)

W02C2340

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